

IN THE HIGH COURT OF BOMBAY AT GOA

FIRST APPEAL NO.79 OF 2004

1. Smt. Abida Bi,
wife of late Mullam
Focrudin Muzawar,
major, housewife,
2. Shri Mullam Abdul Nassir
Muzawar, son of late
Mullam Focrudin Muzawar,
major, service,
3. Mrs. Yasmeen Muzawar,
wife of Shri Mullam Abdul
Nassir Muzawar, major,
housewife,
4. Smt. Mariam Bi Shaikh,
major, married,
Indian National,
5. Shri Shaikh Abdul Kadar,
major, married, Indian
National,
6. Smt. Zarina Bi Khan,
major, married, Indian
National,
7. Shri Salaudin H. Khan,
major, married, Indian
National, all r/o Curti,
Ponda- Goa,
8. Smt. Safina Agha,
major, married, Indian
National,
9. Shri Tajuddin Agha,
major, married, Indian
National, both r/o
Mangor Hill,
Vasco-da-Gama, Goa.

10.Smt. Aminabi Carol,
major, married, Indian
National,

11.Shri Shaikh Issuf Cariol,
major, married, Indian
National, both r/o Duler,
Mapusa- Goa.

12.Smt. Riza Bi Shaikh,
major, married, Indian
National,

13.Shri Issuf Shaikh,
major, married, Indian
National, both r/o House
No.26, Bazar Mol, Curti,
Ponda- Goa.

... Appellants/Plaintiffs

versus

1. Shri Madhav Narayan Naik
Kundaikar, major, married,
builder, r/o H.No.295,
Dasolwada, Kundaim,
Ponda-Goa.

2. Shri Joseph D'Souza,
major, married, builder,
r/o Sequeira Building,
Opp. Syndicate Bank,
Dhavali,
Ponda-Goa.

. .. Respondents/Defendants

Mr. R. G. Ramani, Advocate for the Appellants.

Mr. P. A. Kholkar, Advocate for Respondent Nos. 1 and 2.

CORAM: B. H. MARLAPALLE &
N. A. BRITTO, JJ.

DATE OF RESERVING THE
JUDGMENT: 22-12-2004.

DATE OF PRONOUNCING THE
JUDGMENT: 24-1-2005.

JUDGMENT(PER N. A. BRITTO, J.)

The Plaintiffs in S.C.S. No.26/2002/A have filed the present appeal against the Judgment/Decree dated 13-11-2002 of the learned Civil Judge, Senior Division, Ponda, by which their suit for recovery of possession of 12 flats, or in the alternative, for recovery of Rs.25,20,000/- with interest at the rate of 18% from 4-12-1994, has been dismissed.

2. There is no dispute that the plaintiff no.1 along with her late husband Mullam Focrudin Muzawar(who died on 16-7-1999) had entered into an agreement with defendant no.1 styled as an agreement for development cum sale dated 4-12-1991. Plaintiff No.2 is their son and plaintiff no.4 is their daughter in law. (The remaining plaintiffs are other legal representatives of deceased Mullam Focrudin Muzawar. For brevity's sake they shall all be hereinafter referred to as plaintiffs). By virtue of the said agreement, the plaintiffs agreed to sell to defendant no.1, 4000 sq. meters of their property known as "Borod Tican" situated at Curti, Khandepar, surveyed under S. No. 60 of Curti village for the said

sum of Rs.25,20,000/- .

3. The other terms and conditions of the said development cum sale agreement are that out of 4000 FAR given to defendant no.1, 1000 FAR was to be given to the plaintiffs in the form of flats, namely, in each and every building to be constructed by defendant no.1, one bedroom flat on the ground floor, one bedroom flat on the first floor and one bedroom flat on the second floor were to be provided to plaintiff no.1 and her husband and in the event of their death to their son Mulla Nassir Muzawar. The defendant no.1 was to pay to the said plaintiff no.1 and her husband Rs.50,000/- by way of loan within 1 1/2 months after signing the agreement and remaining Rs.50,000/- within 6 months after the payment of the first instalment which would be paid or refunded at the time of handing over the possession of the flats and in case of failure on the part of the said plaintiff no.1 and her husband the same would be adjusted towards 1000 FAR to be provided to them. The parties had also agreed that 1000 FAR to be given to the plaintiff no.1 and her husband in the form of flats would be calculated in terms of sq. meters and 1000 FAR was to be accepted as equal to 1000 sq. meters. The premises to be constructed were to be completed within a period of 36 months from the date of issuance of licence by the PDA of the proposed buildings and in case of unforeseen contingencies defendant no.1 was entitled for another extension of 6 months to complete the buildings.

4. The defendant no.1 erected buildings A and B but failed to deliver the possession of the flats in the said two buildings to the plaintiffs as a result of which the plaintiffs filed an application under Section 11 of the Arbitration and Conciliation Act, 1996 on 23-6-1997, being C.M.A. No.130/97/A.

5. Thereafter, the plaintiff no.1 along with her late husband and this time both the defendants entered into another agreement dated 16-8-1997. By virtue of this agreement, the agreement dated 4-12-1991 was cancelled and replaced, and, it was agreed that the defendants would hand over to the said plaintiff no.1 and her deceased husband one flat designated as flat S-6 situated on the second floor of an area of 65 sq. meters together with the right to the undivided right as also the right to the common amenities annexed to the said building towards part payment in kind in respect of the land of 4000 sq. meters; it was further agreed that since the defendants could not give the second flat in the said building A, they would pay the value of the said flat in the sum of Rs.4,00,000/- which was equivalent to one flat of an area of 65 sq. meters which was paid by two post dated cheques of Rs.2,00,000/- each. It was also agreed that in case the defendants failed to hand

over the said flat and cash of Rs.4,00,000/- in respect of the said second flat by 22-12-1997 the defendants would be liable to pay Rs.2000/- per month towards the rent of each of the said flats that is to say flat No.S-6 and the second flat of which cash of Rs.4,00,000/- was agreed to be paid; In the building D whose work had just commenced, 5 flats of 71 sq. meters would be allotted to the said plaintiff no.1 and her deceased husband together with the right to undivided land occupied by the said flats towards their share in the said property; In building C to be erected by the defendants consisting of 6 flats would be fully allotted to the plaintiff no.1 and her husband towards their share in the said plot. The defendants agreed to give possession of 5 flats in building D and full building C consisting 6 flats of 55 sq. meters with an additional balcony each as shown in the plan, completed in all respects along with occupancy certificate within a period of 2 years from signing of the agreement failing which the defendants agreed to pay Rs.1,500/- per flat per month as and by way of rent to the plaintiffs which amount would be continued to be paid till the possession of the said flats was given to the said plaintiffs; it was also agreed between the parties that both the buildings C and D would commence together and the defendants undertook not to give possession of the other flats in the said buildings to third parties unless possession

of the above flats reserved to the said plaintiffs was given to them; it was also agreed that the plaintiffs would have a right to object to the occupancy of the said buildings if the defendants failed to give possession of the flats to the plaintiffs; The old agreement dated 4-12-1991 was cancelled and Rs.1,00,000/- paid by the defendant no.1 to the plaintiffs stood forfeited; It was also stipulated that in case of litigation the expenses would be solely borne by the defendants and the area of 4000 sq. meters allotted or agreed to be sold to the defendants would be re-demarcated in the presence of the parties and the same would be shown in the plan to be signed by the parties; parties also agreed that the defendants have sold or agreed to sell an area of 4000 sq. meters that is to say for construction purpose or 4000 FAR and if that area exceeded, the plaintiffs would be entitled to 25% of the said area either in kind or in cash at the prevailing rates. It was further agreed that the defendants would be jointly responsible to the terms and conditions of the agreement as defendant no.1 due to his financial difficulties had entrusted the work of the said buildings to defendant no.2 with their internal arrangements and, therefore, both the defendants would be entirely responsible for any act or omission or commission in respect of the agreement; it was also agreed that the defendants would continue paying or be responsible to pay

interest at the rate of 18% per annum on the said sum of Rs.25,20,000/- which was the cost of the said land and price of the flats and which interest was agreed to be paid in the previous agreement dated 4-12-1991 and was being continued as the defendants had failed to keep up the terms of the previous agreement thus putting the plaintiffs in great hardships and difficulties, which interest commenced from 4-12-1994. It was further stipulated that the defendants would not be entitled to sell any of the flats in any buildings unless and until the defendants handed over the possession of the 13 flats agreed by virtue of the said agreement that is to say 12 flats and 1 flat by way of money of Rs.4,00,000/-. It was stated that this clause was agreed upon in order to avoid the cancellation of the Power of Attorney previously given which was appended to various Government and other departments, including Banks. It was further stipulated that the plaintiffs would get the said flats free of cost towards the value of the land. It was also stipulated that in case the defendants failed to pay the rents of the flats agreed to be given by the plaintiffs then the plaintiffs would have the option of cancelling the agreement and taking possession of all the flats and recovering the balance dues from the defendants by the plaintiffs as their own and the defendants would not have a right to recover the dues from their

parties or the persons to whom the flats have been sold. It was also stipulated that the construction of the bungalow shall have no connection of whatsoever nature with the other 13 flats and accounts of the same would be completely distinct and separate. The bungalow was to be completed in all respects by 31-3-1998 at the exclusive cost of the defendants and in case of failure the defendants were to pay Rs.1,500/- per month towards delay to the plaintiffs until the work completed in all respects.

6. On the same day i.e. on 16-8-1997, the plaintiffs and defendants executed an addendum to the agreement dated 16-8-1997. By way of this addendum, defendant no.2 agreed to hand over to the plaintiffs shop G-6 in building D in lieu of Rs.4,00,000/- within a period of 6 months from the date of signing of the said agreement and meanwhile the defendant no.2 was to pay Rs.2000/- per month from May, 1998 until the possession of the said shop G-6 was given to the plaintiffs. The parties also agreed not to file any cases based on the said cheques issued by the defendants.

7. The case of the plaintiffs was that the defendants failed to deliver the possession of the said 12 flats to the plaintiffs. The plaintiffs requested the defendants to deliver

the possession of the said flats in buildings A, B and D as the same were ready but the defendants informed the plaintiffs that they would deliver all flats at a time together with compensation for delayed period as per the terms and conditions of agreement but failed to keep the commitment. The plaintiffs stated that in the months of November and December, 2001, the defendants abandoned the work in the building complex and the plaintiffs found that some of the flats were occupied by different parties and, therefore, the plaintiffs revoked the Power of Attorney dated 16-8-1997 given in favour of defendant no.2 on 31-5-2001. The plaintiffs stated that the defendants failed to give the possession of the 12 flats to the plaintiffs and further stated that in terms of the agreement dated 16-12-1987 the defendants were liable to pay compensation at the rate of Rs.1000/- for each flat which works out to Rs.18,000/- per month and for 43 months it works out to Rs.5,94,000/-. The plaintiffs stated that they were entitled to the possession of the said flats completed in all respects along with occupancy certificates issued by the Village Panchayat or in the alternative the plaintiffs were entitled to Rs.25,20,000/- being the value of the land along with interest at the rate of 18% from 4-12-1994 till the date of the suit which works out to Rs.31,75,200/-. The plaintiffs stated that they were and are still willing to

perform their part of the agreement dated 16-8-1997 and to convey the property in favour of the defendants by executing appropriate Sale Deed.

8. The defendant no.1 contested the suit, but defendant no.2 did not contest the suit.

9. The case of defendant no.1 was that the plaintiffs had approached the Court by suppressing material facts and without disclosing any cause of action. The defendant no.1 stated that he started the construction of buildings A and B and, when ground floor of the said buildings was complete, the said Mullam Focrudin Muzawar approached the defendant with a request to modify the agreement dated 4-12-1991 and requested him to construct a bungalow in his property situated on the northern side of the plot delivered to defendant no.1 and it was orally agreed that if FAR for the said bungalow was 100, defendant no.1 was to consider it as 150 for the purpose of adjustment in terms of the agreement. Defendant No.1 stated that believing the said Mullam Focrudin Muzawar was a man of word and without obtaining any writing from him proceeded with the work of the bungalow and completed the same in the year 1995 having total area of 234.75 sq. meters and he considered the FAR to be 350 for the purpose of adjustment. Defendant

No.1 stated that he also delivered to the said Mullam Focrudin Muzawar a flat in building A on the second floor, admeasuring 71 sq.meters and for the purpose of adjustment of FAR, the said flat was considered to be 65 and defendant no.1 also paid a sum of Rs.1,00,000/- to the said Muzawar and thus the total FAR given to him works out to 415 and the balance remaining to be given being 585.

10. Defendant No.1 stated that the said Mullam Focrudin Muzawar requested him to modify the agreement thereby providing him 6 flats in C building instead of flats in A and B buildings for the balance FAR of Rs.585/-. Defendant No.1 stated that building C to be constructed was close to the bungalow constructed by the defendant for the said Mullam Focrudin Muzawar and, therefore, the said Mullam opted flats in building C and when defendant no.1 went to the site in order to start construction work of C building the said Mullam objected the construction work and requested defendant no.1 to stop the construction work contending that the construction of the building would obstruct the view of his bungalow. Defendant No.1 stated that since the said Mullam Focrudin Muzawar orally changed the agreement dated 4-12-1991 and requested defendnt no.1 to deliver the possession of the flats to be constructed in C building instead of flats in buildings A and

B, he did not deliver the possession of the flats in buildings A and B to the plaintiffs. The defendant no.1 stated that the said application was filed by the said Mullam Focrudin Muzawar before the Court of Civil Judge, Junior Division at Ponda to harass him. Defendant No.1 stated that as he was in financial difficulty, he took the help of defendant no.2 in order to construct the building and accordingly entered into an agreement with defendant no.2 on 6-2-1997. Defendant No.1 stated that from the addendum to the agreement, it was clear that defendant no.2 had taken the liability for fulfilment of the terms and agreement dated 16-8-1997. Defendant No.1 further stated that in terms of Clause 8 of agreement dated 16-8-1997 the said Mullam Focrudin Muzawar and plaintiff no.1 had agreed to re-demarcate the area of 4000 sq. meters allotted or agreed to be sold to the defendants in the presence of the parties but till date, the plaintiffs had not demarcated the said area and, therefore, they could not proceed with the construction/building activities and as the plaintiffs had not performed their part of the agreement, the defendants could not proceed with the construction activity in terms of the said agreement dated 16-8-1997.

11. The plaintiff no.1 had examined herself in support of the case of the plaintiffs. Defendant No.1 was examined

in defence. The learned Civil Judge, referred to Clauses 8 and 16 of the agreement dated 16-8-1997 and concluded that there was no evidence that the plaintiffs had complied with the said Clauses. In fact, Clause 8 dealt with re-demarcation of the area of 4000 sq. meters in presence of parties, and, Clause 16 dealt with withdrawal of C.M.A. 159/96/A and other injunction applications. The learned Civil Judge, therefore, found that the plaintiffs had not performed their part of the agreement until the filing of the suit. The learned Civil Judge referred to the evidence of P.W.1, Abida as self serving and also observed that the plaintiffs had not produced any corroborative evidence, forgetting the fact that defendant no.2 had himself not contested the suit, and if the evidence of P.W.1, Abida was self serving so was the evidence of defendant no.1 whose evidence was also not corroborated when otherwise it could have been corroborated by defendant no.2. It was understandable that P.W.1, Abida did not know many of the facts as the matter was handled by her deceased husband. Strangely, the learned Civil Judge, Senior Division also observed that the documents produced by P.W.1, Abida were not proved and inspite of the fact that there was no dispute whatsoever regarding the execution of the said two agreements and one addendum which were otherwise produced by defendant no.1 as well. The learned Civil

Judge, entirely forgot the fact that in case there was any separate oral agreement between the parties, modifying the agreement dated 16-8-1997, as alleged by defendant no.1 the entire burden to prove the same was on the defendants' assuming that the defendants were otherwise entitled in law to vary or add to the terms of written agreement.

12. During the pendency of this appeal before this Court, the parties failed to arrive at a compromise and it was represented that there are also disputes between defendant no.1 and defendant no.2 inter se, on account of which no amicable settlement was possible.

13. The learned Civil Judge, Senior Division has dismissed the suit of the plaintiffs basically because the plaintiffs failed to aver in the plaint that they were willing to perform their part of the contract and for non compliance with clauses 8 and 16 of the agreement dated 16-8-1997, by the plaintiffs.

14. The only submission made on behalf of defendant no.1, by Mr. Kholkar, the learned Counsel appearing on behalf of both the defendants is that the suit ought to have been dismissed at least against defendant no.1 as defendant no.1 had incurred no liability towards the

plaintiffs under the said agreement. To support the said submission, Mr. Kholkar has referred to the fact that upon execution of the said agreement dated 16-8-1997 the Power of Attorney issued in favour of defendant no.1 was revoked by the plaintiffs.

15. We are not inclined to accept the said submission. Firstly, the said agreement dated 16-8-1997 clearly stipulated, in terms of Clause 11 thereof, that the defendants (referred to as purchasers) were jointly responsible for the terms and conditions of the agreement as defendant no.1 due to his financial difficulties had entrusted the work of the said buildings to defendant no.2 with their internal arrangements and, therefore, both the defendants would be entirely responsible for any act of omission or commission in respect of the said agreement. Although, the facts relating to the internal arrangements between defendant no.1 and defendant no.2 inter se or the agreement dated 6-2-1997 between them have not been brought on record by either of the parties, the fact remains that the said position was admitted by defendant no.1 in his evidence before the Court. Defendant No.1 had admitted that as per agreement dated 16-8-1997 both of them were responsible to abide themselves with the terms and conditions of the said agreement and not only that in terms

of Clause 20 of the new agreement till requisite number of flats were given in favour of the plaintiffs interest would become payable on the said amount of Rs.25,20,000/- which would commence as stipulated in the said agreement. Further, defendant no.1 had also admitted that in case he had failed to give possession of the said flats within 36 months he would be liable to pay interest on the said amount of Rs.25,20,000/-. It is, therefore, obvious that defendant no.1 continued to be liable under the agreement along with defendant no.2, jointly.

16. The learned Civil Judge was of the view that Clauses 8 and 16 were not complied with by the plaintiffs. As already seen, Clause 8 required the parties to re-demarcate the 4000 sq. meters allotted or agreed to be sold. As far as Clause 16 is concerned, it was stipulated that C.M.A. No.159/96/A and other 3 injunction applications would be withdrawn by the plaintiffs.

17. As far as Clause 8 is concerned, the plaintiffs had pleaded in para 21 of the plaint that they were always willing and ready to perform their part of the agreement dated 16-8-1997 and to convey the property in favour of the defendants by executing an appropriate Sale Deed. P.W.1, Smt. Abida Bi had also confirmed the said position by

stating that they were ready to permit defendant no.1 to construct the building C on the area allotted to him for which he had taken the approval from the P.D.A. and licence from the Village Panchayat. The defendant no.1 in his evidence had stated that he was ready and willing to perform his part of the agreement provided the plaintiffs re-demarcated the said area of 4000 sq. meters. However, it is to be noted that it was not the case of the defendant no.1 that construction of building C could not be done because re-demarcation was not done. On the contrary defendant no.1 had stated that construction of building C could not be done because the said Muzawar had objected the construction of building C. There was no explanation from defendant no.1 as to why flats in building D as agreed upon were not given to the plaintiffs. At no stage did any of the defendants call upon the plaintiffs to re-demarcate the said area. We are, therefore, not inclined to accept that building C remained without being constructed either because deceased Muzawar had objected to its construction or for want of re-demarcation. We are not inclined to believe that deceased Muzawar would have obstructed the construction of building C if, according to defendant no.1, he was to get 6 flats in the said building. In fact the liability of construction of building C was undertaken by defendant no.2 who had not even contested the suit nor

explained as to why building C was not constructed. Defendant no.1 had admitted that in terms of Clause 21 of the agreement dated 16-8-1997 if any of the parties had failed to perform their part of the agreement, the aggrieved party was at liberty to file a suit for specific performance of the agreement and that he had not filed any suit for specific performance against the plaintiffs calling upon them to perform their part of the said agreement. The defendant no.1 had also admitted that as per the sanad, a copy of which he produced at Exh.DW1/5 the area which was allotted to him was demarcated and based on the same he had obtained the sanad. It was not the case of the defendant no.1 that the area for building C as reflected on the plan Exh.DW1/5 was not available for construction of building C. If at all the compound wall was erected, it was erected by the plaintiffs after the filing of the suit, and as stated by P.W.1, Smt. Abida Bi, in the year 2002 or thereabout probably after the defendants abandoned the construction of the said buildings. This is not to say that the area of 4000 sq. meters should not be re-demarcated and re-allotted to the defendants in terms of the said agreement and this also could be done by appointing a Commissioner at the time of the execution of the Decree. However, in our view, the learned Civil Judge, Senior Division was wrong in concluding that it is the plaintiffs who had not complied

with the condition no.8 of the said agreement when there was not even a request in writing on the part of defendant no.1 or defendant no.2 calling upon the plaintiffs to comply with the said condition for compliance of which the plaintiffs have always shown their willingness.

18. As far as condition no.16 was concerned, D.W.1 in his evidence had stated that the said Muzawar had undertaken to withdraw the injunction application filed before the Court but till date the same was not withdrawn by the plaintiffs. However, it is interesting to note that defendant no.1 in his written statement had clearly pleaded that the said Muzawar had filed an application in the said C.M.A. No.159/96/A stating that the parties had settled the dispute out of Court and accordingly the Court had vide its Order dated 16-7-1997 disposed of the applications filed therein. In other words, the said averment in the written statement gave a clear indication that there was no restraint subsisting against the defendants after the said C.M.A. No.159/96/A was disposed of and fresh agreement dated 16-8-1997 was entered into between the parties. In fact, this position has again been admitted by the defendant no.1 in his evidence by stating that after the execution of the said agreement between them and the plaintiffs there were no hurdles for him to construct the remaining building.

D.W.1, had also admitted that in the new agreement there was also a clause that inspite of filing an injunction application by the plaintiffs against them they were not prevented from going ahead with the construction of other buildings. It is well settled that no amount of proof can be given in support of a plea not taken or contrary to the plea so taken. In our view, the learned Civil Judge committed an error by observing that the plaintiffs had not performed their part of the contract at the time of the institution of the said Civil Suit as far as Clause 16 of the agreement was concerned. The defendant no.1 had himself produced an application dated 16-8-1997 filed in the said C.M.A. No.159/96/A which showed that the said Muzawar and defendant no.1 had entered into fresh agreement in respect of the subject matter and had urged the Court to treat the matter as compromised. In our view, the learned Civil Judge was also wrong in concluding that the entire construction project was paralysed by the plaintiffs by revoking the Power of Attorney on or about 31-5-2001. In our view, the plaintiffs having failed to get possession of the flats as stipulated in the agreement and the defendants on the contrary having abandoned the site without constructing the building C which construction was otherwise required to be commenced along with building D in terms of Clause C of the said agreement had no other option but to revoke the

said power of attorney.

19. The defendant no.1 had also pleaded and in terms of the said pleadings had stated that he was requested to construct a bungalow for the plaintiffs and it was orally agreed that if the FAR for the said bungalow was 100, he should consider the same as 150 for the purpose of adjustment in terms of the said agreement dated 4-12-1991. The defendant no.1 had also pleaded and in terms of the same had stated that he had delivered to the plaintiffs a shop in the building D in lieu of flat in building A and for the purpose of adjustment its FAR was considered to be 65 and thus, the defendant no.1 had paid to the plaintiffs total FAR of 415 out of 1000 FAR and balance FAR of 585 was to be given to the plaintiffs. As far as this aspect of the case is concerned, defendant no.1 does not deserve any credibility. As far as the said bungalow which was constructed for the plaintiffs, the parties had clearly stipulated in the agreement, in terms of Clause 20 thereof, that the construction of the bungalow would have no connection of whatsoever nature with the 13 flats and accounts for the same would be completely separate and distinct. Likewise, there was no mention in the addendum that the FAR of the shop given in building D in lieu of the flat in building A would be 65. It is to be noted that the first

agreement dated 4-12-1991 was not complied with by defendant no.1 and which compelled the plaintiffs to approach the Court of Civil Judge, Senior Division and obtain an injunction against defendant no.1. It is thereafter that defendant no.1 brought defendant no.2 in the picture and got the second agreement executed between the plaintiffs on the one hand and both the defendants on the other hand. The terms of the delivery of the shop in lieu of the flat were also incorporated by the parties by way of an addendum. If the parties chose to put in writing whatever they agreed upon, it is difficult to believe, and we are not inclined to believe, that the plaintiffs had entered into separate oral agreements so as to modify the agreement dated 16-8-1997 as far as the FAR of the bungalow or for that matter the said shop was concerned.

20. Admittedly, the defendants, in terms of the agreement dated 16-8-1997 were liable to hand over to the plaintiffs 2 flats in building A, 6 flats in building C and 5 flats in building D and in all 13 flats. The defendant no.1 has also admitted at the fag end of his cross-examination that all the plaintiffs got out of the said agreement dated 16-8-1997 his one shop in building D in lieu of one of the flats in building A and that he has not given to the plaintiffs the remaining 12 flats as stipulated in the said agreement,

for the recovery of which the plaintiffs filed the present suit. At the time of arguments, it was represented to us that not only the incomplete flats in the said buildings which have been constructed have been agreed/sold to third parties but defendant no.2 has also entered into agreements to sell some of the flats in building C which is yet to be constructed and in this situation Mr. Ramani, the learned Counsel of the plaintiffs has fairly conceded that the best and only remedy which the plaintiffs could now avail of against the defendants is the alternate remedy sought by the plaintiffs by way of the return of Rs.25,20,000/- with interest at the rate of 18% from 4-12-1994. However, we have noted that the plaintiffs have got one shop valued at Rs.4,00,000/- in terms of the said addendum dated 16-8-1997. The defendants, therefore, would be entitled to a set off for the said sum of Rs.4,00,000/- from the entire amount of Rs.25,20,000/- i.e. to say Rs.21,20,000/- which we hereby direct the defendants to pay to the plaintiffs jointly with pending and future interest at the rate of 18% until payment in terms of Clause 12 of the said agreement. We also direct that a Commissioner be appointed to re-demarcate the area of 4000 sq. meters. However, we make it clear that in case at the time of demarcation any area to be allotted to the defendants is found short on account of the wall constructed by the

plaintiffs the defendants would be entitled to proportionate reduction in sale price at the rate of Rs.630/- per sq. meter. On the said payment of the cost of land being made the plaintiffs shall convey the disputed property in favour of the defendants or their nominees.

21. Consequently and for reasons stated hereinabove, we allow the appeal and set aside the Judgment/Decree dated 29-12-2003 of the learned Civil Judge, Senior Division and decree the suit in terms of prayer clause (c) subject to the extent indicated hereinabove, with costs by the defendants in favour of the plaintiffs, throughout.

B. H. MARLAPALLE, J.

N. A. BRITTO, J.

RD.